Supreme Court, U.S.
FILED
NOV 1 / 2006
OFFICE OF THE CLERK

No. 06-344

IN THE
Supreme Court of the United States

MINERAL COUNTY, et al.,

Petitioners,

v.

ECOLOGY CENTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 2006

QUESTIONS PRESENTED

1. Should this Court further review the Ninth Circuit's holding that, on the particular facts of this case, the U.S. Forest Service was required under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), to verify its hypothesis that commercial thinning and prescribed burning of old-growth stands would not be harmful before implementing those practices?

2. Should this Court further review the Ninth Circuit's holding that, in this case, the U.S. Forest Service was required to collect on-site soil data for affected timber harvest units?

3. Should this Court further review the Ninth Circuit's holding that a now-repealed regulation promulgated under the National Forest Management Act and the applicable Forest Plan require the U.S. Forest Service to maintain wildlife viability?

CORPORATE DISCLOSURE

Since the decision of the court of appeals, but prior to the filing of this opposition, Respondent Ecology Center, Inc., has become WildWest Institute, Inc. Respondent is a non-profit, non-stock corporation. Respondent has no parent, subsidiaries, or affiliates, and no other entity owns any interest in it. For convenience, this opposition refers to Respondent as Ecology Center, Inc.

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STATEMENT OF THE CASE

Factual Background

The Lolo National Forest Plan (LNFP) was adopted in 1988. In 2000, following a series of wildfires that burned approximately 74,000 acres of the Lolo National Forest (LNF), the Forest Service began developing the Lolo National Forest Post Burn Project (the Project), which provided for logging and road construction activities across approximately 4,600 acres. Pet. App. 40a. In accordance with the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Forest Service prepared an Environmental Impact Statement (EIS). The Service considered several alternatives for the Project and eventually selected alternative number five, which involved the commercial thinning of small diameter timber and prescribed burning in old-growth forest stands, as well as salvage logging of burned and insect killed timber.[1] Pet. App. 3a.

The EIS had three distinct characteristics relevant to the issues now before this Court. First, the EIS provided no evidence that the logging and burning of old-growth stands would benefit, or at least not harm, species that live in those stands, such as the pileated woodpecker. *Id.* 7a. Second, despite the LNFP's requirement that the Forest Service take steps to maintain population viability for at-risk species, and the fact that the Forest Service has designated the black-backed woodpecker as a "sensitive species," the Service did not explain the basis for its conclusion that the removal of post-burn habitats would not adversely affect the black-backed woodpecker, which depends on a post-burn habitat. *Id.* 12a-

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[1]Salvage logging is the logging of dead, burned, or diseased trees.

13a.[2] Finally, although the Regional Soil Quality Standard prohibited the Forest Service from taking any action that would create detrimental soil conditions in fifteen percent of the area to be salvage harvested, *see* Forest Service Manual ("FSM") R1 Supplement 2500-99-1, the Forest Service declined to confirm the accuracy of its estimated soil conditions by direct on-site observation of the activity areas. Pet. App. 19a.

Procedural Background

Respondent Ecology Center, Inc., filed its complaint in the United States District Court for the District of Montana, challenging the Forest Service's decision to permit commercial logging in old-growth stands, the adequacy of the Forest Service's analysis of the impact of salvage logging in post-fire habitat, and the adequacy of the Forest Service's analysis of soil quality. The district court denied Ecology Center's motions for a temporary restraining order and a preliminary injunction, Pet. App. 41a, and later granted summary judgment in favor of the Forest Service.

The Ninth Circuit reversed, with one judge dissenting. The majority held that the Forest Service's decision to permit logging in old-growth stands and post-fire habitats was arbitrary and capricious because, among other things, the Forest Service took no steps to verify its hypothesis that logging in old-growth

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[2]The Forest Service Manual defines sensitive species as "[t]hose plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by: (a) [s]ignificant current or predicted downward trends in population numbers or density[, or] (b) [s]ignificant current or predicted downward trends in habitat capability that would reduce a species' existing distribution." FSM 2670.5.

stands was beneficial to dependent species, did not consider the effect of salvaging on the black-backed woodpecker's viability, and did not directly observe the soil conditions in the affected area. Petitioners' request for panel rehearing and rehearing *en banc* were denied, with all three panel judges voting to deny both requests and no other judge requesting rehearing *en banc*. *Id.* 55a.

Petitioners have now sought review in this Court. The Forest Service—the defendant below and the agency charged with implementing the two federal environmental laws at issue in this case—has not sought review.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, the court of appeals imposed no procedural or substantive requirements on the Forest Service other than those found in NEPA and the National Forest Management Act (NFMA). Furthermore, the court of appeals' holding that the Forest Service's decision was arbitrary and capricious is entirely fact-based; the court correctly identified the applicable law, and applied it to the facts before it. Because the petition presents no legal issue that has divided the lower courts, and because further review by this Court would not provide meaningful guidance for future litigation, the Court should deny the petition.

A. THE NINTH CIRCUIT CORRECTLY IDENTIFIED THE APPLICABLE RULES OF LAW.

In reviewing the Forest Service's decision to treat old-growth stands through prescribed burning and commercial logging, the court of appeals correctly identified and applied the

proper standard of review in determining whether the Service complied with NFMA and NEPA. First, the court recognized that its review of the Forest Service's decision under both NFMA and NEPA is controlled by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and, therefore, the court reviewed the Forest Service's actions only to determine if they were "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." Pet. App. 5a (citing *Lands Council v. Powell*, 379 F.3d 738, 743 (9th Cir. 2004) (citing 5 U.S.C. § 706(2))).

Similarly, the court of appeals correctly stated the law under NEPA. It acknowledged that NEPA does not impose substantive requirements, but rather is designed to "force agencies to publicly consider the environmental impacts of their actions before going forward." Pet. App. 6a (quotation omitted). The court correctly noted that NEPA requires the Forest Service to prepare a detailed EIS, which "provide[s] a full and fair discussion of significant environmental impacts and . . . inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *Id.* (citing 40 C.F.R. § 1502.1).

Finally, the court correctly identified the reach of NFMA's procedural and substantive requirements. The court correctly held that NFMA requires the Forest Service to develop a land and resource management plan and that subsequent agency action must comply with both that plan and NFMA. *Id.* 5a. The court correctly identified NFMA's mandate to preserve diverse wildlife and to maintain soil productivity. *Id.* 6a (citing 16 U.S.C. § 1604(g)). Further, the court correctly held that, under NFMA, the agency's choice of methodology is entitled to deference. *Id.* 8a.

Petitioners' request for further review is based entirely on arguments that the court of appeals incorrectly applied the APA's standard of review to the facts before it. Pet. 6. Although the court of appeals properly applied the APA's deferential standard, even if it had not, Petitioners' disagreement with the lower court's application of properly stated rules of federal law does not provide grounds for review by this Court. *See* S. Ct. R. 10.

B. THE CIRCUIT COURTS AGREE THAT NFMA AND NEPA MAY REQUIRE THE AGENCY TO BRING FORTH SOME EVIDENCE TO SUPPORT ITS HYPOTHESIS.

In requiring that the Forest Service conduct some research to verify that treating old-growth stands will not harm dependent species, the court of appeals' decision is entirely consistent with NEPA and NFMA, as well as this Court's opinions construing those Acts. As such, it does not impose any new substantive or procedural requirements on the Forest Service. Notably, Petitioners do not (and cannot) argue that the decision below is in tension with any other circuit court decision because no split exits over whether, in some instances, the Forest Service must conduct some research to verify a hypothesis about the effect of a federal action on the environment.

1. The Court of Appeals' Opinion Is Consistent with NEPA and NFMA.

The court of appeals held that, by failing to take any steps to verify its hypothesis that treatment of old-growth stands would not harm dependent species, the Forest Service's

decision was arbitrary and capricious. Specifically, the court held that the Forest Service acted arbitrarily and capriciously because it did not test its hypothesis that thinning old-growth stands by commercial logging and prescribed burning will not harm species that depend on those stands to provide a habitat. That decision is entirely consistent with NEPA and NFMA.

NEPA requires that an agency prepare an EIS before undertaking a project that will significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). The EIS must "provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. As many courts have recognized, and as the implementing regulation indicates, one of the purposes of an EIS is to inform the public of the reason for an agency's action. *See Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) ("The 'informational role' of an EIS is to 'give the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process . . . .'") (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)). NEPA's requirement that an agency prepare an EIS is not satisfied simply by the preparation of a document based on an unverified, unresearched hypothesis, in large part because such a bald conclusion, without more, does not demonstrate that the agency has properly considered the relevant environmental concerns. In addition, without explaining why the agency believes a proposed action will (or will not) have a specific effect, an EIS cannot provide a "full and fair discussion of significant environmental impacts" that may result from agency action. 40 C.F.R. § 1502.1. Put otherwise, without such an explanation, the public will have no basis for evaluating the proposed action.

Contrary to Petitioners' argument, an agency's use of a new scientific theory to evaluate proposed action does not relieve the agency of verifying the accuracy of that theory. NEPA's implementing regulations establish that unless the cost of obtaining information necessary to make a reasoned choice among alternatives is exorbitant, tl ; agency must include that information in the EIS. *See* 40 C.F. R. § 1502.22(a) ("If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement."). In this case, the Forest Service declined to include any information verifying its theory that burning and commercially logging old-growth stands would benefit, or at least not harm, the species that depend on those stands, nor did it indicate that the cost of providing such information would be exorbitant.[3] Pet. App. 12a. To the contrary, the Forest Service had subjected old-growth stands to commercial logging and prescribed burning in the past, and thus had an opportunity to directly observe the effects of those practices on dependent species, *id.* 9a, as well as an affirmative obligation to do so under the terms of the LNFP. As such, the decision that the Forest Service acted arbitrarily and

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[3]Any argument that data on the effect of the proposed treatment on dependent species were not essential must fail. The LNFP explicitly requires that the Forest Service maintain 80% of those species dependent upon the snags (dead trees) that are normally found in an unmanaged forest. Lolo National Forest Plan II-14. Because NFMA requires that projects comply with the mandates set forth in the relevant forest plan, 16 U.S.C. § 1604(i), the Service is required under NFMA to insure that the old-growth treatment would not harm dependent species.

capriciously by failing to take any steps to verify its hypothesis is consistent with the mandates of NEPA.

A close reading of the court of appeals' decision underscores the narrowness of that court's review of the Forest Service's action. The court's decision does not require that the Service reach a particular result, but rather that it follow NEPA's procedures. *Id.* ("While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any 'on the ground analysis,' despite the fact that it has already treated old-growth forest elsewhere and therefore has had the opportunity to do so." (citation omitted)). In challenging the Forest Service's unverified hypothesis that salvage logging will not destroy the black-backed woodpecker's habitat, the court went out of its way to make assumptions favorable to the Forest Service's actions, including the assumption that the 2000 fires created post-fire habitat for dependent species, thus reducing the impact of salvage logging. Even assuming all conditions favorable to the Forest Service, however, the Service failed to comply with NEPA's procedural requirements. For example, even if the 2000 fires created post-burn habitat, the EIS does not indicate how much post-burn habitat dependent species require, making meaningful review of the Service's decision to destroy some of that habitat impossible. *Id.* 16a.

Like NEPA, NFMA is not satisfied by hollow allegations that an action will not be harmful to the environment. NFMA requires not only that the Forest Service comply with certain procedural requirements, like those set forth in NEPA, but that the agency take actions to advance certain congressionally identified substantive objectives. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998). The Forest Service must protect forest resources to

provide for wildlife, 16 U.S.C. § 1604(g)(3)(A), and must provide for diversity of plant and animal communities. *Id.* § 1604(g)(3)(B). Under NFMA, the Forest Service is required to develop and implement a land and resource management plan that complies with NFMA's substantive requirements, including the protection of wildlife. *Id.* § 1604(a). Subsequent actions, such as the Project at issue here, must comply with both the relevant forest plan and the substantive mandates of NFMA. *Id.* § 1604(i).

By failing to verify its hypothesis that thinning old-growth stands through burning and commercial logging will not harm dependent species, the Forest Service could not comply with NFMA's substantive mandates. For instance, the LNFP explicitly requires that "sufficient snags and dead material will be provided to maintain 80 percent of the population of snag-using species normally found in an unmanaged Forest." LNFP II-14. There is no dispute that the Forest Service failed to verify its hypothesis that the treatment proposed would benefit, or at least not harm, snag-dependant species such as the black-backed woodpecker. Under NFMA, the Forest Service was required to comply with the LNFP, 16 U.S.C. § 1604(i), and the Service's failure to do so here provides an additional basis for the court's holding that the Service violated that Act. Further, the Forest Service's failure to verify its hypothesis is an especially egregious violation of NFMA because the Service had similarly treated old-growth stands elsewhere and thus had an opportunity to test its effects on dependent species. Pet. App. 9a. Thus, the court's holding that the Forest Service failed to fulfill is responsibilities under the NFMA is entirely consistent with the substantive requirements of that Act.

2. The Court of Appeals' Decision Is Consistent with the Holdings of this Court and of the Other Courts of Appeals.

Petitioners argue that the holding below conflicts with this Court's precedent, insofar as it concluded that the Forest Service violated NEPA and NFMA by failing to provide any evidence to support its unverified hypothesis. This Court has repeatedly held that NEPA requires agencies to take a "hard look" at the environmental consequences of agency action. *See Baltimore Gas*, 462 U.S. at 97; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The court's holding, that the Forest Service violated NEPA by failing to assess whether old-growth treatment would harm dependent species, follows this Court's repeated holdings that the Act requires the Service to examine environmental consequences before taking federal action.

Petitioners' argument that the court of appeals should have been especially deferential because the Forest Service was making a prediction within its area expertise at the "frontiers of science," *Baltimore Gas*, 462 U.S. at 103, is misplaced. First, the court did not evaluate the content of the Forest Service's prediction, but considered only whether the EIS contained enough information to support its conclusion. Second, unlike the agency's prediction in *Baltimore Gas*, the Forest Service's hypothesis as to the effect of the removal of old growth on dependent species was neither on the frontiers of science nor difficult to verify. In *Baltimore Gas*, the Court reviewed the amount of evidence necessary to support the Nuclear Regulatory Commission's adoption of a table measuring the resources used and effluents released by a light-water reactor's

fuel cycle activities over the course of a year's operation. *Id.* at 91. The core of the controversy was the Commission's decision to affix a zero value to the environmental impact of long-term storage of transuranic and high-level waste, because the Commission staff believed that the technology could be developed to isolate that waste from the environment. *Id.* at 91-92. Here, by contrast, the court reviewed only whether commercial logging and prescribed burning of old-growth stands would harm dependent species. As noted earlier, and unlike in *Baltimore Gas*, the Forest Service was able to assess the effect the treatments might have had because the Forest Service had treated similar old-growth stands in the past. Pet. App. 9a. The validity of the Forest Services's assumption does not depend on future technological developments, nor is it undiscoverable.

Other circuits that have considered whether agencies may act under NEPA without providing evidence supporting their conclusions regarding the environmental consequences of federal action have taken the same approach as the court below. *See Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996) (holding that NEPA requires agencies to provide more than mere assertions, but must indicate their basis for them); *Chelsea Neighborhood Ass'n v. U.S. Postal Service*, 516 F.2d 378, 389 (2d Cir. 1975) (holding that without detailed analysis, an agency's conclusions do not satisfy NEPA); *Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973) (holding that NEPA requires that "the agency . . . go beyond mere assertions and indicate their basis for them"); *cf. Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1301-02 (8th Cir. 1976) (holding that Forest Service's actions were not arbitrary and capricious because the EIS contained conclusions supported by intensive research, including thousands of pieces

of information). Because no split among the circuits exists, further review is unnecessary.

Furthermore, the court's holding that the Forest Service violated NFMA by failing to verify that its proposed treatment would not harm dependent species is consistent with other courts' reading of that Act. Although this Court has not yet had the opportunity to interpret NFMA, it has recognized that the Act requires the Forest Service to create plans that provide for coordinated use of forests. *Ohio Forestry Ass'n*, 523 U.S. at 737 (citing 16 U.S.C. § 1604(e), which requires forest plans to "include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness"). The lower court's decision that the Forest Service failed to comply with NFMA by assuming that old-growth treatment would benefit dependent species is consistent with this Court's understanding of that Act.

Similarly, the holding below is consistent with the decision of the only other circuit court to have considered whether NFMA requires the Service to put forth at least some evidence of its hypotheses. In that case, the Eleventh Circuit found that by making assertions in the absence of evidence, the Forest Service violated NFMA. *See Sierra Club v. Martin*, 168 F.3d 1, 5 (11th Cir. 1999) (concluding that deference should not be accorded to Forest Service when it fails to present evidence to support its assertions). No court has held that the Forest Service meets its burden under NFMA in the absence of evidence that its proposed action complies with the congressional mandates set forth in the Act. Thus, review should be denied on the NFMA issue as well.

C. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING THE APPLICATION OF NFMA OR NEPA TO ON-SITE VERIFICATION.

Contrary to Petitioners' argument, the court of appeals did not impose procedural or substantive requirements not found in NEPA. Rather, the court held only that the Forest Service acted arbitrarily when it found, in the absence of any concrete evidence, that the proposed project would not violate the Regional Soil Quality Standard. The court determined that the Service's review of the effects of the proposed plan was insufficient because the Service declined to directly observe the soil in the affected areas, Pet. App. 19a, and did not conduct any other on-site verification of soil conditions. Rather, the Forest Service merely estimated soil conditions on the basis of maps, samples, aerial reconnaissance, and computer modeling. The court's conclusion is consistent with the Service's own expert, who argued that the Service's conclusions about the activity areas were not reliable because the Service failed to test the activity areas themselves, as required by the standard. *Id.* 23a.

Other courts of appeals to have considered challenges to agency action under NEPA—the Fourth and D.C. Circuits—have reached consistent conclusions: Data gathered on-site satisfies NEPA's procedural requirement and may be necessary to a full and fair discussion of the environmental impacts of a proposed course of action. *See Nat'l Audubon Soc'y v. Dept. of Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (noting that the Forest Service was required to gather on-site data to determine where waterfowl loafed and foraged); *cf. Sierra Club v. Dept. of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985) (rejecting plaintiff's challenge to FAA's actions because the agency gathered on-site noise measurements, thereby satisfying

NEPA's procedural requirements). Like the decision below, these cases acknowledge that, in some instances, the Forest Service will be required to conduct some on-site data collection to comply with the procedural requirements of NEPA and to ensure that proposed federal action does not violate NFMA's substantive mandates.

Notably, Petitioners do not—and cannot—argue that there is a split among the circuits on this question. And, indeed, no court has held that NEPA never requires an EIS to contain site-specific analysis. Such a per se rule would overlook a fundamental NEPA precept: that the depth of analysis needed for a proper EIS depends on the nature of the proposed project. *See Dubois*, 102 F.3d at 1287 ("What level of detail is sufficient depends on the nature and scope of the proposed action.").

Curiously, the Forest Service acknowledged that on-site verification would be necessary before going forward with the Project. Pet. App. 24a. As the court of appeals observed, "[t]he fact that the Service plans to conduct on-site verification prior to any harvesting implies that even the Service recognizes that its soil-quality estimates need to be verified." *Id.* Thus, the holding that NEPA and NFMA require the Forest Service to conduct on-site verification of its soil-quality estimates is not only consistent with those Acts, this Court's jurisprudence, and the holdings of its sister courts, but is consistent with the Forest Service's own statements that further study of the soil effects is necessary before implementing agency action.

D. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING WHETHER NFMA AND ITS IMPLEMENTING REGULATIONS HAVE A VIABILITY MANDATE.

The court of appeals held that the Forest Service's decision violated NFMA because the Forest Service failed to analyze and explain the effect salvage logging would have on the black-backed woodpecker. Petitioners argue that the court read a new substantive requirement into NFMA, and that therefore, the court's decision conflicts with those of other circuits. Petitioners are incorrect.

1. The Court of Appeals Did Not Read New Substantive Requirements into NFMA.

In requiring that the Forest Service take steps to maintain wildlife viability, the Ninth Circuit did not read a new substantive requirement into NFMA or its implementing regulations. NFMA's 1982 regulation, 36 C.F.R. § 219.19, required the Forest Service to "maintain viable populations of species across the forest." Although that regulation was repealed in 2000, Petitioners cannot and do not dispute that it applies to the LNFP here, which was adopted in April 1986 pursuant to NFMA's 1982 regulations.[4]

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[4]Petitioners' argument that neither NFMA nor its implementing regulations contain a viability mandate assumes that the Project is governed by the current regulations, which were not finalized until 2005. After the 2000 repeal of the 1982 regulation, the Forest Service was still obligated to maintain wildlife viability from November 9, 2000, until January 2005, under transitional rules,

(continued...)

Additionally, LNFP explicitly adopts the mandate to maintain wildlife viability, especially for species for which survival is a concern, such as sensitive species. *See* LNFP II-1. Specifically, the LNFP requires that, for plants and animals for which viability is a concern, the Forest Service must "manage to maintain population viability." LNFP II-14. Once a Forest Plan is adopted, NFMA prohibits any site-specific activities inconsistent with that plan. 16 U.S.C. § 1604(i); *Inland Empire Pub. Lands Council v. U.S. Forest Service*, 88 F.3d 754, 757 (9th Cir. 1996). Accordingly, the court of appeals correctly held that NFMA requires that the Project contain measures to maintain wildlife viability.

Moreover, even if the Forest Service had not been bound by the LNFP's mandate to maintain viability, the Project itself incorporates the 1982 regulations. *See* Record of Decision, ch. 9 pg. 36 (citing 36 C.F.R. § 219.27). The Service expressly incorporated the 1982 rules into its final decision and was thus bound by 36 C.F.R. § 219.19's viability mandate. *See Envtl. Protection Info. Center v. U.S. Forest Service*, 451 F.3d 1005, 1017 n.8 (9th Cir. 2006) (noting that the Forest Service

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[4](...continued)
which governed until the new regulations were implemented. Like the 1982 rules, the transitional rules required the Forest Service to maintain wildlife viability. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67514-01, 67518 (Nov. 9, 2000); *see Utah Envtl. Congress v. Dale Bosworth*, 443 F.3d 732, 737 (10th Cir. 2006). Petitioners did not argue below that the Forest Plan, and thus the Project, are governed by the new regulations. Thus, any argument that the Plan is not governed by the now-repealed regulation is waived and should not be considered by this Court.

is required to comply with regulations and forest plan in place at the time of its decision).

Finally, the Project is unique insofar as it is governed by regulations that have since been repealed. Because the court of appeals' decision construes regulations that apply to a small set of the Service's actions, the practical application of a decision in this case is necessarily limited to plans and projects governed by the now-repealed regulations. The Lolo National Forest is now in the process of revising its Forest Plan under the new rules. *See* http://www.fs.fed.us/r1/wmpz/ (Lolo Revised Plan proposed on May 16, 2006). For this reason as well, this Court's review is unwarranted.

2. There Is No Circuit Split as to the Role of Viability in Plans and Projects Governed by the 1982 Regulations.

In recognizing that NFMA requires the Forest Service to insure that its decisions will not undermine wildlife viability, the court of appeal's decision is consistent with the holding of every other circuit to construe NFMA, the 1982 implementing regulations, and the 2000 transitional rules. *See Dale Bosworth*, 443 F.3d at 744 (rejecting plaintiff's challenge to a project because it was "not likely to result in a trend towards federal listing or loss of viability"); *Indiana Forest Alliance, Inc. v. U.S. Forest Service*, 325 F.3d 851, 861-62 (7th Cir. 2003) ("The NFMA further requires that each plan set forth objectives to, among other things, ensure a diversity of plant and animal species and maintain the viability of desired species.") (citing 16 U.S.C. § 1604(e)); *Martin*, 168 F.3d at 3 n.2 (noting that forest management plans must "maintain the viability of native and desired non-native vertebrate species"); *Sierra Club v. Espy*, 38 F.3d 792, 800-01 (5th Cir. 1994) ("The regulations

implementing NFMA provide a minimum level of protection by mandating that the Forest Service manage fish and wildlife habitats to insure viable populations of species in planning areas.").

Petitioners misread *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995). There, the plaintiff argued that NFMA required the Forest Service to maintain plant and animal diversity as distinct from tree diversity and apply an ecological approach to forest management. *Id.* at 619. Although the court rejected the argument that the Forest Service is obligated to incorporate conservation biology into its diversity analysis, the Seventh Circuit approved of the Forest Service's population viability analysis and emphasized the importance of analyzing the viability of species that are endangered. *Id.* at 620. Rather than rejecting a reading of NFMA's diversity provision that requires the Forest Service to maintain wildlife viability, the Seventh Circuit embraced that construction. *See Indiana Forest Alliance*, 325 F.3d at 861-82. Thus, the Seventh Circuit's ruling underscores the circuits' uniform approach to NFMA's viability mandate.

E. A SETTLEMENT OF RELATED LITIGATION FURTHER UNDERMINES THE CLAIM FOR REVIEW.

In contemporaneous litigation, the Sierra Club sued the Forest Service based on similar objections to the Project. Pet. App. 4a; *see Sierra Club v. Austin*, No. CV-03-22-M-DWM (D. Mont.). Sierra Club and the Forest Service entered into a settlement, which reduced environmental impacts that would have been caused by the Plan. For example, after the settlement, the number of acres of potential black-backed

woodpecker habitat subject to salvage logging was reduced from 815 to 155. Pet. App. 15a n.5.

As the Sierra Club settlement indicates, the parties here are fully capable of sorting through the remaining issues through negotiation. The successful negotiations between the Sierra Club and the Forest Service, and the potential for similar negotiations between the parties here, provides yet another reason for this Court to deny review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2006